

Docket No. FIFRA-08-2006-0010

FILED  
EPA REGION VII  
HEARING CLERK

## PENALTY COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING

1. This civil administrative enforcement action is authorized by Congress in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). 7 U.S.C. § 1361(a). The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("Rules of Practice")," 40 CFR part 22, a copy of which is enclosed.

3. EPA alleges that Respondent has violated FIFRA by selling or distributing a misbranded pesticide and proposes the assessment of a civil penalty as more fully explained below.

4. Respondent has the right to a public hearing before an administrative law judge to disagree with (1) any fact alleged by EPA in the complaint, or (2) the appropriateness of the proposed penalty.

Page 1 of 4

the Rules of Practice for a complete description of what must be in your answer. **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.**

### **QUICK RESOLUTION**

6. Respondent may resolve this proceeding at any time by paying the specific penalty proposed in this Complaint. Such payment need not contain any response to, or admission of, the allegations in the Complaint. Such payment constitutes a waiver of Respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process. If Respondent chooses to resolve this proceeding by paying the specific penalty proposed in this complaint, payment must be made, within thirty (30) calendar days of receipt of this Complaint, by sending a certified or cashier's check, including the name and docket number of this case, payable to "Treasurer, United States of America," in care of:

Mellon Bank  
Lockbox 360859  
Pittsburgh, PA 15251

A copy of the check must be mailed simultaneously to the attorney listed below.

### **SETTLEMENT NEGOTIATIONS**

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact David J. Janik at (303) 312-6917 or the address below. **Please note that calling or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.**

### **GENERAL ALLEGATIONS**

8. FIFRA makes it unlawful to sell or distribute a pesticide that is misbranded. 7 U.S.C. § 136j (a)(1)(B).

9. Under FIFRA, a pesticide is misbranded if its labeling contains any statement that is false or misleading. 7 U.S.C. § 136 (q)(1)(A).

10. Respondent, a Utah corporation, is the owner and operator of a company located at 1908 West Industrial Circle, Salt Lake City, Utah 84126.

11. Respondent produces the pesticide "Hy-Ko Double D-33," EPA registration number 6836-75-8275.

12. The label of this pesticide product claims that it is a hospital disinfectant effective against the pathogenic organisms *Pseudomonas aeruginosa* and *Staphylococcus aureus*.

13. On at least 12 occasions in 2005, Respondent distributed or sold the pesticide.

14. EPA tested the effectiveness of the pesticide in 2005.

15. The product was not effective against the pathogenic organism *Pseudomonas aeruginosa*.

16. Respondent is a "person" within the meaning of the statute, 7 U.S.C. § 136(s), and therefore subject to the requirements of the statute and/or regulations.

17. Respondent is a "producer" as defined by the statute, 7 U.S.C. §136(w), and a "distributor/seller" as defined by the statute, 7 U.S.C. §136(2)(gg), of a "pesticide" as defined by the statute, 7 U.S.C. §136(2)(u).

18. Respondent's 12 distributions or sales of Hy-Ko Double D-33, EPA registration number 6836-75-8275, with a label claiming it was effective against *Pseudomonas aeruginosa*, constitutes 12 violations of FIFRA. 7 U.S.C. 136j(a)(1)(F).

### **PROPOSED CIVIL PENALTY**

19. FIFRA, 7 U.S.C. § 136l(a)(1), authorizes the assessment of a civil penalty of up to \$6,500.00 per day for each violation. In arriving at the penalty proposed below, EPA, as required by the statute, 7 U.S.C. § 136(a)(4), has taken into consideration, to the extent known, (1) the size of Respondent's business; (2) Respondent's ability to continue in business in light of the proposed penalty; and (3) the gravity of the alleged violations.

20. EPA's approach to calculating appropriate penalties is outlined in its Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), July 2, 1990 (enclosed), which provides a rational, consistent, and equitable method for applying these statutory factors to the facts and

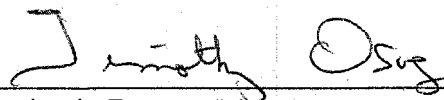
circumstances of specific cases. Using the policies to apply the statutory factors to the facts of this case, EPA proposes that a penalty of **\$ 54,600** be assessed against Respondent for the violations alleged above. EPA's penalty calculation/narrative is enclosed and incorporated as attachment A to this complaint. Additionally, Complainant has enclosed a copy of "Information for Small Businesses."

21. The ALJ is not bound by EPA's penalty policy or the penalty proposed by Complainant, and may assess a penalty above the proposed amount, up to the maximum amount authorized in the statute.

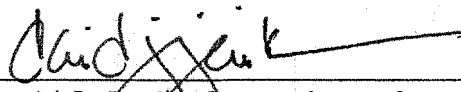
To discuss settlement or ask any questions you may have about this process, please contact the attorney indicated below.

United States Environmental Protection Agency  
Region 8, Office of Enforcement, Compliance and  
Environmental Justice, Complainant

Date: 22 September 2006 By:

  
Elisabeth Evans, Director  
Technical Enforcement Program

Date: 21 September 2006 By:

  
David J. Janik, Supervisory Attorney  
Legal Enforcement Program  
USEPA Region 8  
999 18<sup>th</sup> Street, Suite 300  
Denver, CO 80202  
303.312.6917  
janik.david@epa.gov

IN THE MATTER OF:  
DOCKET NUMBER:

HYLON-KOBURN CHEMICALS INC.  
DOCKET NO. FIFRA-08-2006-0010

CERTIFICATE OF SERVICE

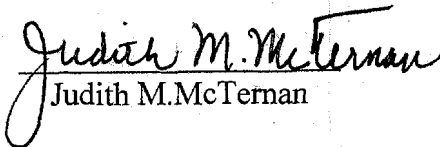
The undersigned hereby certifies that the original and one copy of the Administrative Complaint and Notice Of Opportunity for Hearing was hand-delivered to:

Region VIII Hearing Clerk  
U.S. Environmental Protection Agency  
999-18th Street  
Denver, Colorado 80202-2466

And that a true copy of the same was sent by certified mail, return receipt requested to:

Hylon-Koburn Chemicals, Inc.  
PO Box 26116  
1908 W. Industrial Circle  
Salt Lake City, Utah 84126

9/26/06  
Date

  
Judith M. McTernan

**Penalty Calculation Narrative  
Hylon Koburn Chemical Company**

1. To ensure a uniform and consistent enforcement response and application of the statutory penalty criteria in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the U.S. Environmental Protection Agency (EPA) developed the July 2, 1990 Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (1990 Policy).

2. According to the 1990 Policy, the appropriate enforcement response for the sale and/or distribution of a pesticide not registered under FIFRA Section 3 is a civil penalty. The appropriate enforcement response for producing a pesticide in an establishment not registered with EPA is also a civil penalty. Hylon Koburn (Ridgway) is charged with 12 counts of distributing an misbranded pesticide.

3. FIFRA Section 14(a)(4) requires EPA to "consider the appropriateness of (a civil penalty) to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation."

4. Following the guidance in the 1990 Policy, EPA calculates a proposed civil penalty using the following process. First, the gravity of the offense is identified using Appendix A of the 1990 Policy. Appendix A identifies violations of selling or distributing a pesticide which is adulterated in that the strength or purity falls below the professed standard of quality expressed on the labeling as a gravity level 2 violation. Appendix A identifies a violation of FIFRA section 12(a)(1)(E) and FIFRA section 2(c)(1) - (3) [to sell or distribute any pesticide which is adulterated] as gravity level 2.

5. Second, according to the 1990 policy, the size of business is taken into account. The size of business is determined from the company's gross revenues from all revenue sources during the prior calendar year. When information concerning the size of business is not readily available, the 1990 Policy directs the use of Category I size of business. This will remain the base penalty value Hylon Koburn can establish that it should be considered in a smaller category. Thus, EPA has determined the size of the business category for Hylon Koburn as Category I (gross revenues over \$1,000,000).

6. Third, EPA used the above gravity and size of business components and the Civil Penalty Matrix for FIFRA Section 14(a)(1) violations on page 19 of the 1990 Policy to determine the dollar amount of the proposed penalty. Violations with level 2 gravity and in Business Category I are assessed a penalty of \$6,500 for each count. Thus, the 12 counts in this case have a base penalty of \$78,000. The base penalty includes a 10% increase in accordance with the Civil Monetary Penalty Inflation Adjustment Rule.

7. The 1990 Penalty Policy then directs that the actual circumstances of the violations be considered using gravity adjustment criteria listed in Appendix B of that document. The penalty amounts determined from the matrix can be adjusted either upward or downward depending on the specifics of the case known to EPA at the time of the penalty calculation.

The following gravity adjustment values were used to evaluate the FIFRA violations associated with selling or distributing a pesticide that has been adulterated:

- (a) Pesticide: a value of 2 is assigned due to the signal word "Danger" on the label.
- (b) Harm to human health: a value of 3 is assigned as there was potential serious or widespread harm to human health, and because the harm to human health is unknown.
- (c) Environmental harm: a value of 0 is assigned as there was minor potential or actual harm to the environment, neither widespread nor substantial.
- (d) Compliance history: a value of 0 is assigned as the US EPA had no record of prior FIFRA violations by Hylon Koburn during the last five years.
- (e) Culpability: a value of 0 is assigned as the violations were neither knowing nor willful and did not result from negligence.

This results in a total gravity adjustment value of 5 for the violation associated with selling or distributing a pesticide that has been adulterated.

8. Using a Gravity Adjustment Value of 7, Table 3 in Appendix C of the 1990 Policy states to reduce the matrix value by 30%. Therefore, the penalty for Counts 1 through 12, is reduced by \$23,400, resulting in a final penalty amount of \$54,600.

9. Finally, EPA attempts to take into consideration what effect the calculated penalty would have on the ability of Hylon Koburn to pay based on limited information available to EPA. Adjustments of the proposed penalty can be made at a later date should information warranting such a change become available. No adjustments were made at this time.

10. In sum, EPA arrived at a total penalty of \$54,600 for Hylon Koburn's violations of FIFRA sections 12(a)(1)(E), and 2(c)(1) - (3) by considering all of the FIFRA Section 14(a)(4) penalty criteria through the use of the 1990 Policy.

## FIFRA PENALTY CALCULATION WORKSHEET

Respondent: Hylon Koburn Chemical Company  
1908 Industrial Circle  
Salt Lake City, UT 84126

Counts 1 - 12	
<b><u>Appendix A</u></b>	
1. Statutory violation	§12(a)(1)(E)
2. FTTS code	1EM
3. Violation level	2
<b><u>Table 2</u></b>	
4. Violation category: §14(a)(1) or §14(a)(2)	§14(a)(1)
5. Size of business category	1
<b><u>Table 1</u></b>	
6. Base penalty (Base penalty includes a 10% increase in accordance with the Civil Monetary penalty Inflation Adjustment Rule.)	\$6,500 per count; 12 counts: \$78,000
<b><u>Appendix B</u></b>	
7. Gravity adjustments	
a. pesticide toxicity	2
b. human harm	3
c. environmental harm	0
d. compliance history	0
e. culpability	0
f. total gravity adjustment value (add items 7a-7e)	5
<b><u>Table 3</u></b>	
g. percent adjustment	- 30%
h. dollar adjustment	\$23,400
8. Final penalty (item 7h from item 6)	\$54,600



1st Page Only

ENFORCEMENT RESPONSE POLICY  
FOR THE  
FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA)

Office of Compliance Monitoring  
Office of Pesticides and Toxic Substances  
U.S. Environmental Protection Agency

July 2, 1990

shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with § 21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator, after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in § 21.12(a).

(g) Funds appropriated under section 106 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

#### § 21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

### PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

#### Subpart A—General

##### Sec.

##### 22.1 Scope of this part.

##### 22.2 Use of number and gender.

##### 22.3 Definitions.

##### 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.

##### 22.5 Filing, service, and form of all filed documents; business confidentiality claims.

##### 22.6 Filing and service of rulings, orders and decisions.

##### 22.7 Computation and extension of time.

##### 22.8 Ex parte discussion of proceeding.

##### 22.9 Examination of documents filed.

#### Subpart B—Parties and Appearances

##### 22.10 Appearances.

##### 22.11 Intervention and non-party briefs.

##### 22.12 Consolidation and severance.

#### Subpart C—Prehearing Procedures

##### 22.13 Commencement of a proceeding.

##### 22.14 Complaint.

##### 22.15 Answer to the complaint.

##### 22.16 Motions.

##### 22.17 Default.

##### 22.18 Quick resolution; settlement; alternative dispute resolution.

##### 22.19 Prehearing information exchange; prehearing conference; other discovery.

##### 22.20 Accelerated decision; decision to dismiss.

#### Subpart D—Hearing Procedures

##### 22.21 Assignment of Presiding Officer; scheduling the hearing.

##### 22.22 Evidence.

##### 22.23 Objections and offers of proof.

##### 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.

##### 22.25 Filing the transcript.

##### 22.26 Proposed findings, conclusions, and order.

#### Subpart E—Initial Decision and Motion to Reopen a Hearing

##### 22.27 Initial decision.

##### 22.28 Motion to reopen a hearing.

#### Subpart F—Appeals and Administrative Review

##### 22.29 Appeal from or review of interlocutory orders or rulings.

##### 22.30 Appeal from or review of initial decision.

#### Subpart G—Final Order

##### 22.31 Final order.

##### 22.32 Motion to reconsider a final order.

#### Subpart H—Supplemental Rules

##### 22.33 [Reserved]

##### 22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.

##### 22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.

##### 22.36 [Reserved]

##### 22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.

##### 22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.

##### 22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

##### 22.40 [Reserved]

##### 22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substance Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).

##### 22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.

##### 22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.

##### 22.44 Supplemental rules of practice governing the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act.

##### 22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(8)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.

##### 22.46–22.49 [Reserved]

#### Subpart I—Administrative Proceedings Not Governed by Section 554 of the Administrative Procedure Act

##### 22.50 Scope of this subpart.

##### 22.51 Presiding Officer.

##### 22.52 Information exchange and discovery.

AUTHORITY: 7 U.S.C. 136(i); 15 U.S.C. 2615; 33 U.S.C. 1319, 1342, 1361, 1415 and 1418; 42 U.S.C. 300g–3(g), 6912, 6925, 6928, 6991e and 6992d; 42 U.S.C. 7413(d), 7524(c), 7545(d), 7547, 7601 and 7607(a), 9609, and 11045.

SOURCE: 64 FR 40176, July 23, 1999, unless otherwise noted.

#### Subpart A—General

##### § 22.1 Scope of this part.

(a) These Consolidated Rules of Practice govern all administrative adjudicatory proceedings for:

(1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1361(a));

(2) The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d) and 7547(d));

(3) The assessment of any administrative civil penalty or for the revocation or suspension of any permit under section 105(a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f));

(4) The issuance of a compliance order or the issuance of a corrective action order, the termination of a permit pursuant to section 3008(a)(3), the suspension or revocation of authority to operate pursuant to section 3005(e), or the assessment of any civil penalty under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6925(d), 6925(e), 6928, 6991e, and 6992d), except as provided in part 24 of this chapter;

(5) The assessment of any administrative civil penalty under sections 16(a) and 207 of the Toxic Substances Control Act (15 U.S.C. 2615(a) and 2647);

(6) The assessment of any Class II penalty under sections 309(g) and 311(b)(6), or termination of any permit issued pursuant to section 402(a) of the Clean Water Act, as amended (33 U.S.C. 1319(g), 1321(b)(6), and 1342(a));

(7) The assessment of any administrative civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609);

(8) The assessment of any administrative civil penalty under section 321 of the Emergency Planning and Community Right-To-Know Act of 1980 ("EPCRA") (42 U.S.C. 11045);

(9) The assessment of any administrative civil penalty under section

1ST PAGE ONLY



**Office of Enforcement and Compliance Assurance**  
**INFORMATION SHEET**

**U. S. EPA Small Business Resources**

If you own a small business, the United States Environmental Protection Agency (EPA) offers a variety of compliance assistance and tools to assist you in complying with federal and state environmental laws. These resources can help you understand your environmental obligations, improve compliance and find cost-effective ways to comply through the use of pollution prevention and other innovative technologies.

**Hotlines, Helplines and Clearinghouses**

EPA sponsors approximately 89 free hotlines and clearinghouses that provide convenient assistance regarding environmental requirements.

The National Environmental Compliance Assistance Clearinghouse provides quick access to compliance assistance tools, contacts, and planned activities from the U.S. EPA, states, and other compliance assistance providers:  
[www.epa.gov/clearinghouse](http://www.epa.gov/clearinghouse)

Pollution Prevention Clearinghouse  
[www.epa.gov/opptintr/library/ppcindex.htm](http://www.epa.gov/opptintr/library/ppcindex.htm)

EPA's Small Business Ombudsman Hotline provides regulatory and technical assistance information.  
(800) 368-5888

Emergency Planning and Community Right-To-Know Act  
(800) 424-9346

National Response Center (to report oil and hazardous substance spills)  
(800) 424-8802

Toxics Substances and Asbestos Information  
(202) 554-1404

Safe Drinking Water  
(800) 426-4791

Stratospheric Ozone Refrigerants Information  
(800) 296-1996

Clean Air Technology Center  
(919) 541-0800

Wetlands Helpline  
(800) 832-7828

**EPA Websites**

EPA has several Internet sites that provide useful compliance assistance information and materials for small businesses. If you don't have access to the Internet at your business, many public libraries provide access to the Internet at minimal or no cost.

**EPA's Home Page**  
[www.epa.gov](http://www.epa.gov)

**Small Business Assistance Program**  
[www.epa.gov/ttn/sbap](http://www.epa.gov/ttn/sbap)

**Compliance Assistance Home Page**  
[www.epa.gov/compliance/assistance](http://www.epa.gov/compliance/assistance)

**Office of Enforcement and Compliance Assurance**  
[www.epa.gov/compliance](http://www.epa.gov/compliance)

**Small Business Ombudsman**  
[www.epa.gov/sbo](http://www.epa.gov/sbo)

**Innovative Programs for Environmental Performance**  
[www.epa.gov/partners](http://www.epa.gov/partners)

